87-2113

No. _____



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

GREGORY JACKSON
Petitioner,

vs.

STATE OF ALASKA
Respondent.

# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

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June 24, 1988

## I. QUESTIONS PRESENTED FOR REVIEW

1. In a first degree murder case, may a waiver of a defendant's mandatory due process right to an instruction on the lesser-included offense of manslaughter be presumed from a silent trial record where the defendant was neither informed nor aware of such right, where there is no evidence in the trial record of any such tactical decision by counsel, and where neither the court nor the prosecution addressed the issue?

2. What are the constitutional obligations of a State trial judge to instruct on the lesser-included offense of manslaughter and the defense of heat of passion as to first degree murder where said instructions are required as a matter of law by the State statutory scheme?

3. Can the failure to give mandatory instructions on the lesser-included offense of manslaughter and the defense of heat of passion as to a charge of first degree murder be excused where there was no contemporaneous record at trial showing a tactical decision by counsel or the defendant to forego said instructions and merely because, in post conviction proceedings involving allegations of ineffective assistance of counsel, trial counsel advanced a self serving explanation of "trial tactics" as a rationalization for failing to seek such instructions and where the defendant testified he was neither consulted nor concurred in any such purported tactics?

4. Even if a state court may constitutionally allow a defendant to adopt a "all or nothing" gamble and forego

lesser-included instructions and statutory defenses, must the record at trial affirmatively show the defendant was personally addressed and concurred in such tactics?

5. Where a defendant is charged with first degree murder, does it violate the Federal constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to due process, effective assistance of counsel, jury trial, equal protection, and comparable rights under the Alaska Constitution, to fail to instruct on the lesser-included offense of manslaughter and heat of passion as a defense where said instructions are required by the law of the State of Alaska?

6. Where a defendant is charged with first degree murder, does it violate

the Federal constitutional rights to effective assistance of counsel, to equal protection, and to due process under the Sixth, Fifth, and Fourteenth Amendments and comparable rights under the Alaska Constitution where trial counsel fails to investigate or obtain discovery prior to trial; fails to prepare; fails to request instructions on manslaughter as a lesser-included offense and heat of passion as a defense; fails to object to the court's instruction that a unanimous acquittal was required before a lesser-included defense could be considered; fails to voir dire on racial prejudice where a defendant is black; and fails to call crucial exculpatory witnesses?

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NO. _____

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OCTOBER TERM, 1987

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

TO: THE HONORABLE CHIEF JUSTICE WILLIAM H. REHNQUIST AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Gregory Jackson, respectfully prays that a Writ of Certiorari issue to review the final Opinion of the Court of Appeals of the State of Alaska entered in this proceeding on February 11, 1988.

## II. OPINION BELOW

The Alaska Supreme Court denied a Petition for Hearing in Gregory Jackson, Petitioner v. State of Alaska, Respondent, File No. S-2626, on March 21st, 1988 (Exhibit A in Appendix herewith) in an unreported order. The Court of Appeals of the State of Alaska affirmed Petitioner's conviction on direct appeal from a denial of a post conviction motion for a new trial and for post conviction relief due to ineffective assistance of counsel in Jackson v. State, Slip Opinion No. 781, File No. A-2026, on February 11, 1988. (Exhibit B in Appendix herewith). The case is reported at 750 P.2d 821.[1]

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1/ The instant case was actually appealed three times to the Alaska Court of Appeals. The procedural posture of the case is as follows:

## III. JURISDICTION

The Entry of Final Judgment of the Supreme Court/Court of Appeals of the State of Alaska was effective on March 21st, 1988, as reflected by the file stamp on the final order by the Alaska Supreme Court denying a Petition for Hearing in Alaska Supreme Court No. S-2626 (Exhibit A in Appendix herewith).

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1. After conviction by jury and prior to sentencing, Mr. Jackson filed, with certain supporting documents, a Motion for New Trial on August 21, 1984, alleging ineffective assistance of counsel and failure to instruct on lesser-included offenses. (Exhibit J in Appendix herewith);

2. The Superior Court on November 6, 1984, summarily denied said motion and refused to conduct an evidentiary hearing (Exhibit E in Appendix herewith);

3. A direct appeal was taken to the Alaska Court of Appeals in Case No. A-805, alleging ineffective assistance of counsel, the failure to instruct on the

A final opinion of the Court of Appeals of the State of Alaska was entered on February 11, 1988,in Slip Opinion No. 781, File No. 2026 (Exhibit B in Appendix herewith). Pursuant to Alaska Supreme Court Rules of Appellate Procedure 302 et. seq., a timely Petition for Hearing in the Alaska Supreme Court was filed on February 26, 1988.

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3/ Cont'd lesser-included offense of manslaughter, heat of passion as a defense, and the erroneous instruction with regard to order of deliberations, and the failure to hold a hearing with respect to Appellant's ineffective assistance of counsel claim as required by Barry v. State, 675 P.2d 1292, 1295 (Alaska App. 1984) (Exhibit M in Appendix herewith);

4. In Case No. A-805, the Alaska Court of Appeals reversed and remanded for an evidentiary hearing by Memorandum Opinion and Judgment No. 959 of October 23, 1985, (Exhibit C in Appendix herewith);

Jurisdiction is invoked under 28 U.S.C. ¶1257(3) and Rules 17 to 20 of the United States Supreme Court Rules of Appellate Procedure. The instant petition is timely under Supreme Court Rule 20 since filed within 60 days after the effective date of the Entry of Judgment of the Alaska Supreme Court and the Alaska Court of Appeals.

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5. By written orders of December 23, 1985 and February 21, 1986, the Superior Court continued to refuse to hold an evidentiary hearing and an appeal was taken to the Alaska Court of Appeals in Case No. A-1471 (Exhibit F in Appendix herewith);

6. Subsequently, a new Motion for New Trial and/or Motion for Post Conviction Relief was filed by Mr. Jackson on June 4, 1986, (Exhibit I in Appendix herewith); with new supporting signed affidavits and evidentiary hearings were held. The Superior Court denied said motions and made certain written findings (Exhibit D in Appendix herewith);

7. A new Notice of Appeal was filed in the Alaska Court of Appeals in No. A-2026 from the final denial of the Motion for New Trial and Post Conviction Relief after the evidentiary hearings (Exhibit K in Appendix herewith) and the Appeal in Case No. A-1471 was dismissed insofar as evidentiary hearings had actually been conducted;

8. On direct appeal from final denial of the Motion for New Trial and Motion for Post Conviction Relief as a result of the issues pending from Case No. A-805 and Case No. A-2026, the Court of Appeals issued Slip Opinion No. 781 on February 11, 1988 (Exhibit B in Appendix herewith).

9. A Petition for Hearing was filed in the Alaska Supreme Court from said Court of Appeals Slip Opinion No. 781 in a timely fashion and was denied on March 21st, 1988, (Exhibit A in Appendix herewith) and this Petition for Writ of Certiorari follows.

## IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the right to due process, effective assistance of counsel, jury trial, and equal protection under the Fifth, Sixth, and Fourteenth amendments to the United States Constitution, and Article I Sections 1, 7, and 11 of the Alaska Constitution.

The case likewise involves the right to have a jury properly instructed as to the lesser-included offense of manslaughter and heat of passion as a defense to first and second degree murder under AS 11.41.100, AS 11.41.110, AS 11.41.120, AS 11.41.115, and AS 11.81.335, and further, under Alaska Rules of Criminal Procedure 30 and 31.

The text of said constitutional provisions, rules and statutes is set out

in the Appendix herewith pursuant to United States Supreme Court Rule 21(f) and 21(k).

## V. STATEMENT OF THE CASE

Gregory Jackson was convicted, following a jury trial, of murder in the first degree, a violation of AS 11.41.100. Mr. Jackson shot the decedent, Vernon Jackson (unrelated to Gregory Jackson) in a night club in Anchorage, Alaska, in self-defense when Gregory Jackson correctly perceived that the decedent was attempting to pull a weapon from his inside coat pocket after an altercation involving Gregory Jackson's female companion, Carmelita Danzy, who was the former girlfriend of Vernon Jackson.

Trial Counsel failed to request instructions on the lesser-included offense of manslaughter and heat of

passion as a defense to first and second degree murder which are mandatory instructions under Alaska Law given the factual circumstances of the case. The jury was erroneously instructed that they had to acquit the defendant of first degree murder before considering the charge of second degree murder.

Moreover, the court and the prosecution never discussed the giving of lesser-included offense instructions as to manslaughter or instructions as to heat of passion as a defense, such that it was plain error to fail to do so. No objections to giving such instructions were made by the defendant or defense counsel.

The failure to request a lesser-included instruction was rationalized by the Alaska Courts pursuant

to trial counsel's self serving testimony at a post conviction hearing, that said failure had been a purported tactical choice (Exhibit G in Appendix herewith). Despite these after the fact excuses by trial counsel, there was no statement or evidence on the record at the time of trial that the issue was even discussed and/or contemplated by the court or counsel or the defendant, or that there was any tactical decision by counsel or the defendant to attempt to waive the right to lesser-included offense instructions or instructions as to the defense of heat of passion.

The record is devoid of any testimony by Mr. Jackson that he participated in any such decision, and there is an affidavit in the record stating that he was not informed of these

rights (Exhibit I in Appendix herewith). Trial counsel's testimony on these issues was equivocal (Exhibit G in Appendix herewith).

Although the events at issue and the trial occurred in Anchorage, Alaska, Gregory Jackson was represented by George C. Howard, an attorney from Chicago, Illinois. Mr. Howard travelled to Anchorage solely for purposes of the arraignment and trial and conferred with Petitioner for only approximately 1 hour prior to the commencement of trial.

Mr. Howard did not investigate or begin preparation of the defense case until the night before jury selection began, did not even obtain discovery or police reports until the night before jury selection began, did not review grand jury transcripts until a 30 minute recess

during the course of trial, and conducted no investigation either before or during trial. As a result of this total abrogation of the responsibility to provide effective assistance of counsel, Mr. Howard failed to call crucial exculpatory witnesses who would have testified as follows:

1. The decedent affirmatively left the club in question after the initial contact with the defendant, armed himself with a gun and re-entered the club prepared for combat such that he was the actual aggressor and so as to support the claim of self-defense.

2. The State's sole eye witness to the shooting had actually made a statement the day after the homicide indicating that he believed

that Gregory Jackson killed Vernon Jackson in self-defense and the police had forced the eye witness to testify otherwise.

3. The decedent, Vernon Jackson, had a long standing history and reputation for violence including numerous prior acts of violence which would have been admissible as circumstantial evidence that he was the true aggressor.

Moreover, despite the fact that the defendant is black, the decedent was black, trial counsel Mr. Howard is black, most of the witnesses in the case are black, and the empaneled jury was all white, Mr. Howard totally failed to voir dire jurors on racial or bias issues, even though such practice is customary as part

of the normal practice of defense counsel in the Anchorage area.

Pursuant to United States Supreme Court Rule 21.1(h), the Federal issue as to ineffective assistance of counsel was raised by virtue of a Motion for New Trial filed at the Superior Court level on August 21, 1984, (Exhibit J in Appendix herewith), and was also raised by virtue of an initial appeal taken to the Alaska Court of Appeals in Case No. A-805, (Exhibit M in Appendix herewith).

Pursuant to remand by the Alaska Court of Appeals on October 23, 1985, in Memorandum Opinion and Judgment No. 959, File No. A-805, (Exhibit C in Appendix herewith), further evidentiary hearings were held and the denial of the Motion for a New Trial and for Post Conviction Relief with regard to ineffective assistance of

counsel was again appealed to the Alaska Court of Appeals by Mr. Jackson in Alaska Court of Appeals No. A-2026.

The issues concerning the failure to instruct with regard to lesser-included offenses were raised in the statement of issues at page V and Argument at page 18-20 in Appellant's Opening Brief of April 16, 1985, Case No. A-805 (pages 169 to 178 of Exhibit O in Appendix herewith) and Appellant's Reply Brief of July 5, 1985, Case No. A-805 at pages 2-3, 11-13, 14-15. (pages 181 to 186, 187 to 191, 192 to 194 of Exhibit O in Appendix herewith). The issue with regard to ineffective assistance of counsel was addressed by the Alaska Court of Appeals Memorandum Opinion and Judgment No. 959 of October 23rd, 1985, (File No. A-805) at page 1 to 3 (pages 30 to 35 of

Exhibit C in Appendix herewith) and further, was addressed in the Alaska Court of Appeals Slip Opinion No. 781 of February 11th, 1988,(File No. A-2026 and File No. A-805) at pages 3 to 11 (pages 3 to 27 of Exhibit B in Appendix herewith).

The issue with regard to the failure to request lesser-included offense instructions was addressed at page 5 and 10 of the Alaska Court of Appeals Slip Opinion No. 781 of February 11, 1988, (File No. A-2026 and File No. A-805). (pages 12, and 23 to 24 of Exhibit B in Appendix herewith)

Although the Alaska Court of Appeals made a specific finding that:

> "Howard's investigation in this case was clearly inadequate for a first degree murder charge" Slip Opinion No. 781 of February 11, 1988 at page 6, (page 5 of Exhibit B in Appendix herewith). (Emphasis added).

they nonetheless affirmed the conviction although conceding that:

> In summary we find this to be a close case. We are particularly troubled by Howard's lack of investigation. Id at page 11, (page 25 of Exhibit B in Appendix herewith). (Emphasis added).

Note that in the Court of Appeals Slip Opinion No. 781 of February 11, 1988, at page 7 (pages 17 to 18 of Exhibit B in Appendix herewith), the Court of Appeals specifically acknowledged Mr. Jackson's position that any purported tactical decisions of trial counsel were vitiated by his failure to investigate.

The Alaska Court of Appeals as noted, rationalized the failure to request lesser included offense instructions as a purported "tactical decision" by trial counsel despite the fact that the trial record is devoid of any evidence that Mr.

Jackson was advised of or aware of the right, or that trial counsel, the prosecution, or the court even considered the issue. In particular, the Court of Appeals stated:

> Jackson contends that Howard's failure to request any lesser included offense instructions was ineffective assistance. This case went to the jury on instructions for murder in the first degree and murder in the second degree only. At the evidentiary hearing, Howard testified that he believed that his client had an excellent chance of being totally acquitted. He was afraid if he requested lesser included offenses, the jury might convict his client on one of the lesser included offenses rather than totally acquitting him. Judge Ripley found that this was a reasonable tactical choice. As we have stated before, tactical choices of counsel are entitled to difference. We agree with Judge Ripley that this was a reasonable tactical choice. Slip Opinion No. 781 of February 11, 1988, at page 10 (pages 23 to 24 of Exhibit B in Appendix herewith). (Emphasis added).

The issue with regard to ineffective assistance of counsel and specifically whether it is valid to claim such a retroactive rationalization as to "tactical decisions" was presented to the Supreme Court of the State of Alaska by virtue of Mr. Jackson's Petition for Hearing of February 26, 1988, at pages 1 and pages 9 through 10 (pages 195 to 199 of Exhibit C in Appendix herewith). Given the specific briefing at the Court of Appeals level as to the position that the ineffective assistance of counsel claim included the failure to seek proper instructions, and given the specific petition to the Alaska Supreme Court as to the validity of the rationalization by the Court of Appeals that a post trial claim of a purported "tactical choice" by trial counsel

justified the failure to so instruct, the federal issue was properly preserved at both the Alaska Court of Appeals level and the Alaska Supreme Court level.

## VI. ARGUMENT

### A. THE FAILURE TO INSTRUCT ON MANSLAUGHTER AND HEAT OF PASSION AS A DEFENSE WAS CONSTITUTIONAL ERROR

The failure of defense counsel to request lesser-included instructions, the failure of the prosecution to seek lesser-included instructions, the failure of the court on its own initiative to give lesser-included instructions, and the failure of defense counsel, the court, and the prosecution to seek and/or instruct as to the heat of passion as a defense, deprived Mr. Jackson of his right to due process, equal protection, effective assistance of counsel, and right to jury

trial under the United States and Alaska Constitutions.

Mr. Jackson was convicted by a jury which was not instructed as to the mandatory lesser-included offense of manslaughter, or further, with respect to the heat of passion defense to first and second degree murder.[2]

Blackhurst v. State, 721 P.2d 645 (Alaska App. 1986), discussed in detail infra at page 26 to 36 holds squarely that such instructions are mandatory with charges and factual circumstances such as those presented in the instant case.

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2/ Note further that this denied the defendant his right to jury trial insofar as the failure to correctly instruct the jury deprived the defendant of the "constitutional right to have the jury determine every material issue presented by the evidence" People v. Modesto, 382 P.2d 33 (Cal. 1963).

Defense counsel failed to request modification of the Instruction which stated jurors are required to acquit on the greater offense before considering the lesser.

In Keeble v. United States, this court stated:

> . . . [I]t is now beyond dispute that the defendant is entitled to an instruction on a lesser-included offense if the evidence will permit a jury to rationally to find him guilty of the lesser offense and acquit him of a greater . . . Indeed, while we have never explicitly held that the due process clause of the Fifth Amendment guarantees the right of a defendant to have a jury instructed on a lesser-included offense, it is nevertheless clear that a construction of the major crimes act to preclude such an instruction would raise difficult constitutional questions.

Keeble, 412 U.S. 205, at 208, 212-213, 93 S.Ct. 1993, at 1995, 1997-8 (1973). (Emphasis added).

Moreover, the court in Keeble correctly focused not on questions of tactical maneuvering but on the fundamental right to have a correctly instructed jury.

In Beck v. Alabama, 477 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the court again reiterated this theme as to an Alabama law which precluded lesser-included instructions in capital offenses. The court stated:

> [I]t has long been recognized that it can also be beneficial to the defendant [to instruct on lesser-includeds] because it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal . . . This principle was first announced in Stevenson v. United States, 162 U.S. 313, 323, 16 S.Ct. 839, 843, 40 L.Ed. 980:
>
> > A judge may be entirely satisfied ... [of] ... malice ... yet if there be

> any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury ...
>
> . . . Although the Rule is permissibly phrased, it has been universally interpreted as granting a defendant a right to a requested lesser-included instruction if the evidence warrants it.

Beck, 437 U.S. at 635-36, 100 S.Ct. at 2388-89. (Emphasis added).

The Court focused on the fundamental correctness of jury instructions, not upon whether lesser charges were requested or opposed by the Government or the defense, and expressly disapproved the argument of the theoretical tactical advantages.

The Supreme Court of California likewise has held:

> The requirement of instructions on lesser-included offenses is based on the elementary

> principle that the court should instruct the jury on every material question. ... [T]he state [has no] legitimate interest in obtaining a conviction of the offense charged where the jury entertains a reasonable doubt of guilt of the charged offense but returns a verdict of guilty of that offense solely because the jury is unwilling to acquit where it is satisfied that the defendant has been guilty of wrongful conduct constituting a necessarily included offense. Likewise, a defendant has no legitimate interest in compelling the jury to adopt an all or nothing approach to the issue of guilt. Our courts are not gambling halls but forums for the discovery of truth.

People v. St. Martin, 463 P.2d at 390 (Cal. 1970). (Emphasis added).

In People v. Geiger, 674 P.2d 1303 (Cal. 1984), the Court stated:

> Instructions on lesser offenses are required because a procedure which affords the trier of fact no option other than conviction or acquittal when the evidence shows that the defendant is guilty of some crime but not

> necessarily the one charged, increases the risk the defendant may be convicted notwithstanding the obligation to acquit if guilt is not proven beyond a reasonable doubt. The pressures which create that risk thus effect the reliability of the fact finding process and thereby undermine the reasonable doubt standard.

Geiger, 674 P.2d at 1307-08 (Emphasis added).

Numerous Alaska cases hold that a trial judge is required to give a lesser included instruction where there is a factual dispute as to an element of the greater offense, such that the jury could acquit on the greater offense or convict on the lesser-included offense. See Christie v. State, 580 P.2d 310 (Alaska 1978); Johnson v. State, 665 P.2d 566, 569 (Alaska App. 1983); Rice v. State, 589 P.2d 419, 420 (Alaska 1979); Elisovsky v. State, 592 P.2d 1221 (Alaska 1979); and

State v. Minano, 710 P.2d 1015, 1016 (Alaska 1985).

As noted, the leading case in Alaska rejecting the purported right of a defendant to "elect" as to certain instructions including lesser-includeds is Blackhurst v. State, 721 P.2d 645 (Alaska App. 1986). See also, Dresnek v. State, 697 P.2d 1059 (Alaska App. 1985).

In Blackhurst, supra, after an exhaustive review of the Alaska statutes relating to murder, self-defense, heat of passion, and manslaughter, in a case with facts squarely on point to the instant one, the court held that heat of passion manslaughter is a lesser-included offense of second degree murder and instructions on same are mandatory:

> Blackhurst was subsequently charged with murder in the second degree. During pretrial

hearings, the state consistently represented that the only issue in this case was whether the killing was justified. The state also referred to Blackhurst's anger over having his job terminated, which according to the prosecution's theory, "[put] him over the edge."

At trial, Blackhurst claimed self-defense. He asserted the defense through his counsel's opening and closing statements and through his taped interview with Troopers McCoy and Holland, which was introduced into evidence during the state's case-in-chief. At the close of trial, the court instructed the jury on murder in the second degree.[1], and on self-defense.[2] Additionally, at the state's request and over Blackhurst's objection, the court instructed the jury that it could consider convicting Blackhurst of the lesser-included offense of manslaughter[3] if it found that Blackhurst acted out of heat of passion[4] rather than in self-defense. In allowing the manslaughter instruction, the trial court concluded that there was sufficient evidence to allow the jury to find that Blackhurst might have acted out of heat of passion after being provoked by

Lane. The trial court reasoned that the jury should be permitted to consider heat of passion manslaughter in the event it elected to reject Blackhurst's claim of self-defense.

On appeal, Blackhurst claims that it was error for the trial court to instruct the jury on heat of passion manslaughter. The threshold question presented by Blackhurst's argument is whether heat of passion manslaughter is a lesser-included offense of second-degree murder. Lesser-included offenses are governed by Alaska Criminal Rule 31(c), which provides:

> Conviction of Lesser Offense. The defendant may be found guilty of an offense necessarily included in the offense charged, or of an attempt to commit either the offense charged or the offense necessarily included therein if the attempt is an offense. When it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he

can be convicted of the lowest of those degrees only.

Alaska courts have rejected the strict statutory elements approach to the lesser-included offense instructions and have applied the broader cognate approach. See, Elisovsky v. State, 592 P.2d 1221, 1225-26 (Alaska 1979); Wilson v. State, 670 P.2d 1149, 1151 (Alaska App. 1983); Marker v. State, 692 P.2d 977, 980 (Alaska App. 1984).

[1] Under the cognate approach, the court must examine the elements of the offense, the respective theories of the case, and the evidence presented at trial. Norbert v. State, 718 P.2d 160, 162-63 (Alaska App. 1986). The court must then determine whether, in the context of the case, it would be possible for the jury to find that the accused had committed the greater offense but not the lesser. Id. See also Rivett v. State, 578 P.2d 946, 947 (Alaska 1978). If a finding of guilt on the greater offense would be inconsistent with acquittal on the lesser, and there is a disputed element that distinguishes the greater from the lesser, an instruction on the lesser must be given. Rice

v. State, 589 P.2d 419, 420 (Alaska 1979); Marker v. State, 692 P.2d at 980.

At trial, Blackhurst conceded that all of the statutory elements of murder in the second degree had been established by the state's evidence. He relied exclusively on the theory of self-defense. On appeal, he contends that, because no element distinguishing the greater offense from the lesser was actually disputed, the manslaughter instruction was improper. We disagree.

When Blackhurst raised the issue of self-defense, justification became a disputed factual element that the state was required to disprove beyond a reasonable doubt. Under the revised Alaska Criminal Code, self-defense is included among the various forms of conduct falling under the broad heading of justification. See AS 11.81.300-11.81.450. With the exception of duress and entrapment, conduct amounting to justification is classified in the revised code as a defense. See AS 11.81.300. Under AS 11.81.900(b)(15), defense is defined as follows:

> (15) "defense" other than an affirmative defense means that
>
> (A) some evidence must be admitted which places in issue the defense; and
>
> (B) the state then has the burden of disproving the existence of the defense beyond a reasonable doubt. . . .

The statutory treatment of justification as a defense is reflected in the Alaska Pattern Jury Instruction For Murder in the Second Degree, which was appropriately given in Blackhurst's case:

> A person commits the crime of murder in the second degree if, without justification, and with intent to cause serious physical injury to another person. . . . [Emphasis added.]

. . . [2] Considering the evidence presented at trial, then, it is apparent that the issue of justification was disputed. In support of the second-degree murder charge, the prosecution maintained that Blackhurst's conduct was entirely unjustified. As a fall-back position, the state

sought to show that, at most, the conduct was partially justified as an act committed in the heat of passion. Blackhurst, on the other hand, maintained that his conduct was fully justified as an act of self-defense. Given the evidence presented at trial, a jury might well have decided that Blackhurst did not reasonably believe that it was necessary to use deadly force against Lane in self-defense. The jury might nonetheless have entertained reasonable doubt as to whether Blackhurst had been seriously provoked by Land and had killed him in the heat of passion. See Kirby v. State, 649 P.2d 963, 969 (Alaska App. 1982).

[3] Because Blackhurst's claim of self-defense was predicated exclusively on the theory that Land had attacked Blackhurst with a knife, the jury could not rationally have found that Blackhurst acted in self-defense without also finding that he had been seriously provoked by Lane.[5] Since justification was a disputed factual element distinguishing second-degree murder from manslaughter, the manslaughter charge was properly determined to be a

lesser-included offense of the murder charge under the cognate approach.

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1. Alaska Statute 11.41.110(a)(1) reads in pertinent part:

> (a) A person commits the crime of murder in the second degree if
> (1) with intent to cause serious physical injury to another person or knowing that the conduct is substantially certain to cause death or serious physical injury to another person, the person causes the death of any person ...

2. Alaska Statute 11.81.335 provides in pertinent part:

> Justification: Use of deadly force in defense of self. (a) Except as provided in (b) of this section, a person may use deadly force upon another person when and to the extent
>
> (1) the use of the nondeadly force is justified under AS 11.81.330; and

(2) the person reasonably believes the use of deadly force is necessary for self-defense against death, serious physical injury, kidnapping, sexual assault in the first degree under AS 11.41.410(a)(1) or (2), sexual assault in the second degree, or robbery in any degree.

(b) A person may not use deadly force under this section if the person knows that, with complete personal safety and with complete safety as to others, the person can avoid the necessity of using deadly force by retreating. . . .

3. Alaska Statute 11.41.120(a)(1) provides in pertinent part:

> (a) A person commits the crime of manslaughter if the person
>
> (1) intentionally, knowingly, or recklessly causes the death of another person under circumstances not amounting to murder in the first or second degree. . . .

4. Alaska Statute 11.41.115 provides in pertinent part:

> (a) In a prosecution under AS 11.41.100(a)(1) or

11.41.110(a)(1), it is a defense that the defendant acted in a heat of passion, before there had been a reasonable opportunity for the passion to cool, when the heat of passion resulted from a serious provocation by the intended victim.

(e) Nothing in (a) or (b) of this section precludes a prosecution for or conviction of manslaughter or any other crime not specifically precluded.

(f) In this section,

. . .

(2) "serious provocation" means conduct which is sufficient to excite an intense passion in a reasonable person in the defendant's situation, other than a person who is intoxicated under the circumstances as the defendant reasonably believed them to be; insulting words, insulting gestures, or hearsay reports of conduct engaged in by the intended victim do not, alone or in combination with each other, constitute serious provocation.

> 5. Sufficient provocation to raise heat of passion includes, inter alia, a sudden angry quarrel, mutual combat, and assault or battery. W. LaFave & A. Scott, Criminal Law, § 76, at 574-75 (1972).

Blackhurst, supra, at 721 P.2d 647-649 (Emphasis added).

In People v. Wickersham, 650 P.2d 311 (Cal. 1982), the California Supreme Court faced the issue of whether the doctrine of "invited error" would be invoked where defense counsel and/or the defendant had not articulated on the contemporaneous trial record a deliberate tactical objection to required instructions at the time of trial. The Court held that with regard to the failure to instruct on second degree murder in a first degree murder case:

> However, because the trial court is charged with instructing the

> jury correctly, it must be clear from the record that defense counsel made an express objection to the relevant instruction. In addition, because important rights of the accused are at stake, it must be clear that counsel acted for tactical reasons and not out of ignorance or mistake.

Wickersham, 650 P.2d at 330. (Emphasis added).

People v. Sedeno, 518 P.2d 913 (Cal. 1974) likewise holds clearly that there is an obligation to instruct on lesser-included offenses even when as a matter of trial tactics, the defendant objects.

Mr. Jackson specifically asserted to the Alaska Court of Appeals in his opening brief of April 16, 1985, at page 20, (page 178 of Exhibit O in Appendix herewith) that failure to give the lesser-included instructions and instructions on heat of passion as a

defense to first and second degree murder was plain error, and this court should so hold.

Neither the defense nor the prosecution has the right to agree to a "all or nothing verdict" and insist that lesser-included offenses not be given. People v. Chamblis, 236 NW.2d 473 (Michigan 1975), holds squarely that such a "all or nothing" approach cannot be adopted by defense counsel.[3]

The dissenting opinion of Chief Justice Rabinowitz and Justice Burke in Dresnek v. State, 718 P.2d 156 (Alaska 1986) is instructive:

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3/ For additional cases in Alaska with regard to the necessity of instruction on lesser-included offenses see Kuzmin v. State, 725 P.2d 721 (Alaska App. 1986); Moore v. State, 740 P.2d 472 (Alaska 1987); Komakhuk v. State, 719 P.2d 1041 (Alaska App. 1986).

We have held that a trial court's failure to give an instruction properly requested by the defendant on a lesser-included offense is error. Christie v. State, 580 P.2d 310, 318 (Alaska 1978). We stated the rationale for our ruling as follows:

> [W]hen facts are put in evidence which support instructions as to lesser degrees and they are not given, the jury may be faced with the choice either of acquitting a man who is obviously guilty of some wrong or of finding guilty a man who is not guilty of the crime charged. Id. at 318 (citations omitted).
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> . . . . The pressure could be enormous . . . to vote to convict on a charge of which [there is] reasonable doubt, rather than to "hold out" and leave a guilty defendant unconvicted. The lesser-included instruction is therefore necessary to ensure that the defendant is "accorded

the full benefit of the reasonable doubt standard," . . . and to protect against "the substantial risk that the jury's practice will diverge from theory." (Emphasis added).

Accordingly, this Court should grant the Petition for Writ of Certiorari pursuant to Rule 17.1(d) and/or Rule 17.1(c) with regard to the crucial issue of whether self serving, after-the-fact rationalization by trial counsel in post conviction evidentiary hearing testimony as to a purported tactical decision to waive, without the permission of the defendant, the right to a lesser-included offense and to an instruction as to heat of passion as a defense to first and second degree murder, can be used to

justify denial of the basic due process right to have a jury so instructed.[4]

B. MR. JACKSON WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND THIS COURT SHOULD GRANT A PETITION FOR WRIT OF CERTIORARI AND REVIEW BOTH THE LAW AND THE FACTS.

Strickland v. Washington, 466 U.S. 668 (1964) articulated a two-prong standard to review ineffective assistance of counsel claims, which requires a showing that counsel's performance was deficient and that the defendant was prejudiced.

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4/ Note that Lanier v. State, 486 P.2d 981 (Alaska 1971) deals with tactical decisions made in the presence of the jury in the heat of trial by counsel as to waivers of certain substantive rights and does not deal with an attempt outside the presence of the jury to waive basic constitutional rights by failing to ask for appropriate instructions and then attempting to justify same in a post conviction hearing with regard to ineffective assistance of counsel.

In particular, the defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id at 694.

These are mixed questions of law and facts which are properly reviewed de novo. Id at 698. See also, United States v. Birtle, 792 F.2d 846, 857 (9th Cir. 1986).

It is sufficient to raise a reasonable doubt that prejudice resulted. Risher v. State, 523 P.2d 421, 424-425 (Alaska 1974).

Kimmelman v. Morrison, 106 S.Ct. 2474, 2580, 2587-89 (1986) held that the failure to investigate and the failure to seek discovery constitute lack of

preparation which puts the defendant at risk notwithstanding vigorous cross examination by defense counsel.

Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1983) held that the failure to investigate and locate witnesses whose missing testimony might have effected a jury's assessment of credibility is sufficient to meet the Strickland standard. See also, Arnold v. State, 685 P.2d 1261, 1263-64 (Alaska App. 1984).

In the instant matter it is significant that the attempts of the Alaska Court of Appeals to rationalize the clear failure of Mr. Howard to investigate, to obtain police reports or statements of witnesses prior to the night before jury selection, his failure to read the grand jury transcript until the middle of the trial, or to investigate before or

during trial , and his failure to seek mandatory instructions on lesser included offenses as purported "tactical" decisions, ignores the real impact of the omissions. The California Supreme Court has held that counsel's failure to investigate vitiates a purported "tactical" decision rationale advanced after trial.

> . . . while counsel's omissions might have been based on otherwise proper tactical considerations, nevertheless, counsel acted without adequately investigating his client's defense. His decisions relative to the tactics available therefore were not "informed" decisions . . . and so effectively deprived the defendant of the presentation of a potentially meritorious defense.

People v. Shaw, 674 P.2d 759, 762-63 (Cal. 1984). (Emphasis added).

In Strickland this Court stated:

> Strategic choices made after a less or incomplete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation.

Strickland, 468 U.S. at 691. (Emphasis added).

Mr. Howard failed to investigate and call at trial witnesses in three critical exculpatory areas, namely:

1. A witness as to a prior[5] inconsistent statement by the prosecutions' sole eye witness, which prior statement specifically supported Mr. Jackson's claim of self-defense. Compare

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5/ References to the record below are as follows: Trial Transcript is referred to as TTR; post conviction evidentiary hearing with regard to effective assistance of counsel transcript is referred to as HTR.

TTR 397:8 - 398:11 and 410:4-25 with HTR 85:21 - 86:8, 22 and 87:20.

2. That the decedent/alleged victim actually armed himself with a gun in specific preparation to accost the petitioner so as to show that the decedent was the actual aggressor; HTR 67:4-68:13; Slip Opinion at page 8. (pages 19 to 20 of Exhibit B in Appendix herewith).

3. That the decedent/alleged victim had a long standing reputation for violence, and further, routinely acted in an aggressive manner so as to show that he was the aggressor; HTR 196:21-197:6; Slip Opinion at page 9-10.[6]

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6/ United States ex rel Cross v. Deboretis, 811 F.2d 1008, 1016 (7th Cir. 1987) held:

> A defendant resting his ineffective assistance of counsel claim on counsel's

In People v. Martinez, 685 P.2d 1203 (Cal. 1984), the California Supreme Court held that a new trial was warranted where a witness was discovered after trial who could have provided possible exculpatory evidence with respect to other wise incriminating testimony and was not discovered or called at trial due to trial counsel's failure to thoroughly investigate. Such evidence and the failure to produce same mandates reversal

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6/ Cont'd

> failure to investigate and locate witnesses must . . . convince the judge that, if found and called at trial those witnesses might have made a difference in the outcome of the case. (Emphasis added).

See also, People v. Shaw, 674 P.2d 759, 762 (Cal. 1984) citing People v. Pope, 590 P.2d 859 (Cal. 1979) as to mere requirement of showing of a potentially meritorious defense.

since it constitutes a critical gap in the prosecution's case. The court concluded that if a jury were to find there was even a reasonable possibility that this testimony was true, that it would be sufficient to raise a reasonable doubt and the trial court could not refuse to grant a new trial merely because of trial counsel's lack of diligence since to do so would be to punish the defendant for his counsel's ineffective performance. Id at 1208-1209.

Accordingly, when one analyzes the numerous errors and omissions of Mr. Howard, it is inescapable that reversal is warranted.

The failure to call the witness Mary Stills as to the decedent arming himself for combat obviously would have impacted the jury's consideration of the

self-defense asserted by Mr. Jackson. This would have served not only as evidence that the decedent was in fact the aggressor, but would have corroborated the defendant Jackson's testimony that the decedent was attempting to pull a gun from his breast pocket at the time of the necessity of exercising deadly force in self-defense.

The witness Hurist Joubert would have directly impeached the sole eye witness Albert Ford, so as to constitute crucial exculpatory evidence as to Mr. Ford's later testimony and support the self-defense asserted.

Clearly evidence of the decedent's prior violent reputation and conduct would have had a significant impact on the jury's consideration of whether he was the aggressor and whether Mr. Jackson's decision that it was

necessary to use deadly force in self-defense was reasonable.

In all likelihood, the failure to seek the mandatory instructions with regard to the lesser-included offense of manslaughter and the defense of heat of heat of passion was even more egregious and prejudicial.

That is, it is totally circular logic and "Catch 22" rationalization for the State, the trial court, and the appellate courts to maintain that although Mr. Jackson admittedly received deficient assistance from Mr. Howard, that the due process violation from the failure to instruct on lesser-included defenses and the defense of heat of passion can be rationalized by Mr. Howard's after-the-fact claim that some tactical decision was involved.

Clearly these failures cannot be said to not have contributed to the verdict since the very reason there is a due process requirement of so instructing the jury is precisely to avoid the possibility that a defendant who is guilty of the lesser offense, but innocent of the greater, will not be convicted merely because the jury is forced with a Hobson's Choice of convicting an innocent man or acquitting a partially guilty one.

Accordingly, pursuant to the United States Supreme Court Rules of Appellate Procedure 17.1(b) and 17.1(c), this Court should grant Certiorari and reverse since the courts of the State of Alaska have decided the important Federal question with regard to the degree of prejudice that may be presumed by a failure of counsel to investigate, call crucial

witnesses, or to seek mandatory instructions in conflict with the relevant holdings of this Court and the California Supreme Court.

Under Strickland, supra; Wickersham, supra; Risher, supra, it cannot be said that these major failings on behalf of Mr. Howard, if rectified, would not possibly have had an impact on the jury's deliberations both with regard to the true nature and actions of the decedent in being the aggressor, and further, with regard to the sole eye witness Albert Ford's perception of the events as in reality being self-defense.

Equally prejudicial and requiring reversal under these cases is the failure to seek mandatory instructions on the lesser-included offense of manslaughter and the defense of heat of

passion as a defense to first and second degree murder.

Further, the Alaska courts have by implication decided the important Federal question of whether post conviction testimony by an ineffective counsel can be used to rationalize the waiver of basic constitutional rights and the right to basic instructions on the law under the due process clause of the United States Constitution.

## VII. SUMMARY AND CONCLUSIONS

The Petitioner/Respondent, Gregory Jackson, was convicted by a jury which was misinstructed on the law and was given the Hobson's Choice of either convicting the defendant of a murder for which he is innocent or acquitting him of all conduct despite the fact that they may have felt that he was guilty of

manslaughter as a lesser-included offense under the law of the State of Alaska.

he in no way enjoyed his due process rights and rights under the statutes of the State of Alaska and the Constitution of the United States to an instruction on applicable defenses including heat of passion.

The trial court and the prosecution had an equal obligation with defense counsel to ensure that the jury was properly instructed and the total lack in this record of any evidence or statement at the time of trial of any tactical choice by the trial counsel or the defendant to waive such basic constitutional rights vitiates any post conviction rationalization advanced by trial counsel attempting to justify his own position in after-the-fact evidentiary hearings.

As a matter of law this Court should rule, as has the California Supreme Court, that the record at trial must affirmatively demonstrate a tactical decision by the defendant and his counsel to waive lesser-included offenses even if such waiver is consistent with basic principles of due process. A better position is that no such waiver is even allowable since as noted, courts are not gambling halls and the jury should be properly instructed regardless of attempts by either party to make tactical decisions to modify the rules of law.

Under Rule 17, the Court should grant the Writ of Certiorari with regard to both the issue concerning the effect of such failure to seek basic instructions under the due process clause of the United States Constitution, and further, with

regard to the issue of attempts to avoid the holding in Strickland v. Washington, supra, with regard to the sacred obligation to provide effective assistance of counsel.

Accordingly, the Court should grant the Petition for Writ of Certiorari and Reverse.

Respectfully submitted this 24th day of June, 1988.

WEIDNER AND ASSOCIATES
A Professional Corporation

By: Phillip Paul Weidner
PHILLIP PAUL WEIDNER
Attorney for
Petitioner

STATE OF ALASKA )
) ss
THIRD JUDICIAL DISTRICT )

CERTIFICATE OF SERVICE

I hereby certify, that pursuant to Rule 21, Rule 28.2, Rule 28.5(b) and Rule 33 of the Supreme Court Rules of Appellate Procedure, that I am a member of the Bar of the United States Supreme Court in good standing, and that three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Alaska and the Court of Appeals of the State of Alaska were served upon counsel for the Respondent by depositing same in the United States mail at Anchorage, Alaska, first class, postage pre-paid, addressed to:

Robert D. Bacon
Assistant Attorney General
Attorney General's Office
Special Prosecutions and Appeals
1031 West 4th Avenue, Suite 318
Anchorage, Alaska 99501

and further, that three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Alaska and the Court of Appeals of the State of Alaska were served upon the Attorney General of the State of Alaska by depositing same in the United States mail, at Anchorage, Alaska, first class, postage pre-paid, addressed to:

Grace Berg Schaible
Attorney General
Attorney General's Office
Box K
Juneau, Alaska 99811

DATED at Anchorage, Alaska, this 24th day of June, 1988.

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